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Regulating Europe: Problems and Prospects

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The European Policy Unit

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Indroduction

There is a tendency, especially among European scholars to identify regulation with the whole realm of legislation, governance and social control. This use of the term would make the study of regulation coextensive with law, economics, political science, sociology; indeed, with the entire body of social scientific knowledge. Within the framework of American public policy and administration, however, regulation has acquired a more specific meaning. It refers, to use Philip Selznick's formulation, to sustained and focused control exercised by a public agency over activities that are valued by a community (Selznick 1985:363-364).

Each term in this definition is important. The emphasis on valued activities excludes, for example, most of what goes on in the criminal justice system: the detection and punishment of illegal behavior is not regulation in the sense in which the term is used here. On the other hand, market activities can be "regulated" only in societies that consider such activities worthwhile in themselves and hence in need of protection as well as control. The reference to sustained and focused control by a public agency suggests that regulation is not achieved simply by passing a law, but requires detailed knowledge of, and intimate involvement with, the regulated activity. This requirement will necessitate, sooner or later, the creation of a specialized agency, or regulatory commission, entrusted with fact-finding, rule-making and enforcement.

Regulation, in the sense just specified, has always represented a very significant portion of the activities of the

European Community. Moreover, a greatly accelerated growth of regulation is to be expected with the completion of the internal market. Yet, for reasons which are discussed below, the study of the organizational and politico-economic aspects of Community regulatory policy making has been sadly neglected. The aim of this paper is to introduce some of the basic considerations needed to analyze the problems and prospects of regulation in Europe.

1. From the interventionist state to the regulatory state

Why European scholars have traditionally devoted so little attention to the political economy of regulation is a question of more than academic interest. Because of this conceptual deficit we still lack theories capable of explaining the recent growth of regulatory policies at the national and, especially, at Community level. Our ability to offer advice about the choice of instruments and of appropriate institutional arrangements is correspondingly weak.

A telling sign of the gap that exists today between theory and policy developments in this area is the way in which the issue of deregulation has suddenly emerged in public discourse without any previous debate about regulation as a distinct type of policymaking. Hence the confusion about the meaning of deregulation in the European context and its relationship to other concepts likes privatization, de-legification and re-regulation.

Historically, one can understand why European economists, political scientists, and legal scholars have not developed anything comparable to American theories of regulation in generality, analytic precision and empirical richness. Nationalization, to mention one significant historical factor, has been in most countries of Europe the functional equivalent of

American-style regulation in such key areas as transportation, telecommunications and public utilities.

Even when the same methods, such as entry and price regulation, standard setting or licensing, have been used, there has been a general reluctance to rely on specialized, single-purpose commissions or administrative agencies. Instead, regulatory functions have been assigned to traditional ministries or to inter-ministerial committees. Important regulatory decisions are often taken at cabinet level.

By contrast, in the United States there is a long tradition -- which at the federal level goes back to the Interstate Commerce Commission (1887) -- of regulatory commissions independent of the President and to some extent even of Congress. Even in the case of executive-branch (or "dependent") agencies such as the Environmental Protection Agency (EPA), the Occupational Safety and Health Administration (OSHA), or the Food and Drug Administration (FDA), it has been argued, for example by the "new Jeffersonians", that they effectively constitute separate branches of government outside of direct presidential control.

The preponderance of informal procedures for regulatory decision making in Europe -- compared with the procedural requirements laid down by the U.S. Federal Administrative Procedure Act for formal adjudication by regulatory bodies -- and the delegation of important regulatory functions to self-managing, semi-private bodies like the German Berufsgenossenschaften and various national institutes for technical standardization, are other factors that explain the low visibility of regulatory policymaking and the consequent lack of sustained scholarly attention.

However, the main difference between the American and the European approach to regulation has been ideological rather than institutional. The American rejection of nationalization as a politically and economically viable option expressed a widely held belief that the market works well under normal

circumstances, and should be interfered with only in clearly circumscribed cases of "market failure": natural monopolies, market dominance, windfall profits, excessive competition, negative externalities, inadequate or asymmetrically distributed information (Breyer 1982).

In this view, regulation is primarily a tool to correct the defects of the market and increase allocative efficiency; distributive aims should be pursued by other means. As numerous recent studies have shown, the market-failure rationale is insufficient to explain the actual development of public regulation in the United States. Indeed, how can one explain in efficiency terms the regulation of basically competitive industries like airlines, trucking, agriculture, financial services, and long-distance telephone services? Still, the very success of the deregulation movement in a number of areas shows how important the ideology of economic efficiency has been, and still is, as a normative basis of public regulation in America.

In Europe, popular acceptance of the market ideology is a much more recent phenomenon. As Charles Meier (1978:23-49) has argued in his study of American international economic policy after the second world war, Washington's successful effort in Europe, as in Japan, was to ensure the primacy of economics over politics, to de-ideologize issues of political economy into questions of output and efficiency.

Not surprisingly, the treaty establishing the European Coal and Steel Community in 1951 rejected the option of nationalization or internationalization of the ownership of the means of production in coal, iron, and steel in favor of a common market in these products achieved by removing custom duties, quotas, and other obstacles to free trade. Similarly, the Treaty of Rome creating the European Economic Community calls for the institution of a system which will ensure that competition in the common market is not distorted. In other words, the integration of national markets is to be accomplished not by planning, but by

means of free and competitive trade. To police competition among producers and to ensure and sustain the free movement of goods, important regulatory powers were assigned to the Commission of the EEC.

At the national level, the heydays of state interventionism in the 1950s and 1960s were followed, in the 1970s, by a shift to traditional conservative attitudes in economic and social policy. Important segments of public opinion, not only at the right end of the political spectrum, increasingly tended to view the state less as the solution than as one of the problems that impeded the adjustment of the European economies to far-reaching structural changes in the world economy. The twin notions of deregulation and "government failure" expressed the growing skepticism in the ability of the state to act as planner, entrepreneur, employer of last resort, and direct provider of services which, it was argued, the market or voluntary, not-for-profit organizations could produce more efficiently. Instead of trying to do everything, and in the end doing nothing well, the state should limit itself to providing essential services and public goods, including the rules of the economic game and the protection of non-commodity values. Thus, paradoxically, the debate on privatization and deregulation has in the end succeeded in focusing the attention of European public opinion on regulation and its problems. The nature of these problems may be clarified by considering, however briefly, the American experience.

2. The ideology of expertise and the delegation of powers

A firm commitment to the virtues of the market is an important, but not the only, justification for the regulatory approach. Faith in the power of expertise as an engine of social improvement -- technical expertise which neither legislators or courts nor bureaucratic generalists presumably possess -- has

been another important source of legitimation for American regulatory agencies.

For writers of the New Deal era like Merle Fainsod, regulatory commissions emerged and became instruments of governance for industry precisely because Congress and the courts proved unable to satisfy the "great functional imperative" of specialization. Regulatory agencies "commended themselves because they offered the possibility of achieving expertness in the treatment of special problems, relative freedom from the exigencies of party politics in their consideration, and expeditiousness in their disposition". (Fainsod 1940:313).

Among the important reasons for the establishment of regulatory commissions mentioned by Cushman (1941) is the greater ease in recruiting experts for an independent agency than for executive departments. James Landis, probably the most influential theoretician of regulation in this period, finds an even closer relationship: "The demand for expertness, for a continuity of concern, naturally leads to the creation of authorities limited in their sphere of action to the new tasks that government may conclude to undertake" (Landis 1966:23).

And conversely, in Say's law fashion, the supply of regulation creates its own demand of expertise: "With the rise of regulation, the need for expertness became dominant; for the art of regulating an industry requires knowledge of details of its operation, ability to shift requirements as the condition of the industry may dictate, the pursuit of energetic measures upon the appearance of an emergency, and the power through enforcement to realize conclusions as to policy" (Landis 1966:25-26).

To be sure, the New Deal advocates of regulation knew that, as Fainsod put it, the expertness of the regulatory bureaucracy is not always above suspicion. Still, they insisted that issues of fact should be handled by experts, using whatever methods appear to be most appropriate. Judicial review of the evidence used in reaching a regulatory decision would be a serious threat

to "the very virtue of specialized knowledge which constitutes one of the chief justifications for the establishment of commissions" (Fainsod 1940:3-4).

Thus the "great functional imperative" of specialization and expertise leads to a blurring of the distinctions stressed by the classical doctrine of the separation of powers. For example, with the Interstate Commerce Act of 1887, the U.S. Congress delegated its own power to regulate an important aspect of interstate commerce, namely interstate railroad traffic, to an agency designed especially for the purpose -- the Interstate Commerce Commission (ICC). This was an important institutional innovation. As Landis would comment some fifty years later, the novelty with respect to traditional administration consisted not only in the precise definition of the scope of its powers -- a particular industry -- but especially in regard to the responsibility given the commission for the exercise of those powers. In the words of Landis, (1966:16) "In the grant to it of that full ambit of authority necessary for it in order to plan, to promote, and to police, it presents an assemblage of rights normally exercisable by government as whole".

Because of this broad delegation of executive, legislative, and judicial authority, American regulatory bodies have been accused of constituting a politically irresponsible "fourth branch of government" never envisaged by the framers of the federal constitution. In the case of the ICC, the original delegation of powers was accompanied by a fairly clear specification of standards regarding jurisdiction of the commission and regarding the behavior of the railroads deemed unlawful. The commission was given the power to be flexible, but it was constrained in its discretion by clear standards, as stated in the act and as understood in public policy (Lowi 1979:96). The "capture theory" of regulation (Stigler 1975) predicts that regulatory agencies become captured by the very interests they are supposed to control. The ICC was in fact

captured by its railroad clientele, but only after it was given new and entirely different responsibilities, such as power over minimum rates in addition to power over maximum rates, by the Transportation Act of 1920.

It is probable that the danger of "capture" of regulatory agencies by regulated industries has been exaggerated by recent critics of regulation. For example, clear evidence of capture (as distinct from bargaining and other forms of political exchange) is lacking in the vast area of social regulation (Wilson 1980). However, the problem of political oversight and control over the regulatory process exists and is made especially serious by some characteristic features of the process itself. We shall come back to this question after we have analyzed the role of the Commission of the European Communities (EC) as a regulator or, if one prefers, as a "fourth branch" of the governments of the Member States.

3. The EC Commission as regulator

The vast literature on European integration and on policy making in the European Community contains very few studies of the political economy of regulation at the Community level. So far, the most significant contributions to the study of EC regulation have come from legal scholars who are naturally more concerned with procedural questions than with substantive policy evaluations or general theoretical explanations. Given the importance of Community regulation in so many areas of economic and social life, from banking and technical standardization to environmental and consumer protection, this scarsity of regulatory policy analyses is surprising and can only be explained by the absence of a suitable theoretical framework.

Aside from competition policy and measures necessary for the integration of national markets, few regulatory policies or

programmes are specifically mentioned in the Treaty of Rome. The transport and energy policies which could have given rise to significant regulatory activities, have remained largely undeveloped. On the other hand, the agricultural, regional and social policies which, together with development aid, absorb about 80 per cent of the Community budget, are mostly distributive rather than regulatory in nature.

How, then, can one explain the continuous growth of Community regulation, even in the absence of explicit legal mandates? Take the case of environmental protection, an area not even mentioned by the Treaty of Rome. In the two decades from 1967 to 1987, when the Single European Act finally recognized the authority of the Community to legislate in this area, almost 200 directives, regulations, and decisions were introduced by the Commission. Moreover, the rate of growth of environmental regulation appears to have been largely unaffected by the political vicissitudes, budgetary crises, and recurrent waves of Europessimism of the 1970s and early 1980s. From the single directive on preventing risks by testing of 1969 (L68/19.3.69) we pass to 10 directives/decisions in 1975, 13 in 1980, 20 in 1982, 23 in 1984, 24 in 1985 and 17 in the six months immediately preceding passage of the Single European Act.

The case of environmental regulation is particularly striking, partly because of the political salience of environmental issues, but it is by no means unique. The volume and depth of Community regulation in the areas of consumer-product safety, medical drug testing, banking and financial services, and even telecommunications, to mention only some policy domains, is hardly less impressive. In fact, the hundreds of regulatory measures recently proposed by the Commission for the completion of the internal market by 1993 only represent an acceleration of a trend set in motion decades ago.

The continuous growth of supranational regulation is not easily explained by traditional theories of Community policy

making. Even the model developed by two distinguished scholars in order to explain the development of a Community policy for the protection of the environment fails, by explicit admission of its authors, to "predict the patchy but substantial amount of process regulation in the EC" (Rehbinder and Stewart 1985:315). Product regulation, these authors imply, is easier to explain because it is directly related to the free movement of goods across the common market. But what can be said of the growing number of Community regulations aimed at protecting non-commodity values such as health, safety or environmental quality?

Traditional theories are not very helpful here. At most, they suggest that the serious implementation gap that exists in the European Community may make it easier for the Member States, and their representatives in the Council, to accept Commission proposals which they have no serious intention of applying. The main limitation of this argument is that it fails to differentiate between areas where policy development has been slow and uncertain (for example, transport, energy or research) and areas where significant policy development has taken place even in the absence of a clear legal basis.

Moreover, existing theories of Community policy making do not usually draw any clear distinction between regulatory and other types of policies. Instead, our approach emphasizes the special characteristics of regulatory policy making. Hence we shall try to explain the growth of EC regulation primarily in terms of those characteristics.

4. Explaining the growth of EC regulation

One essential characteristic is the limited influence of budgetary limitations on the activities of regulators. The size of non-regulatory, direct-expenditure programmes is constrained by budgetary appropriations and, ultimately, by the size of

government tax revenues. In contrast, the real costs of most regulatory programs are borne directly by the firms and individuals who have to comply with them. Compared with these costs, the resources needed to produce the regulations are rather trivial. As Christopher De Muth (1984:25) writes, "Budget and revenue figures are good summaries of what is happening in welfare, defense, or tax policy, and can be used to communicate efficiently with the general public over the fray of program-by-program interest group contention... In the world of regulation, however, where the government commands but nearly all the rest takes place in the private economy, we generally lack good aggregate numbers to describe what is being "taxed" and "spent" in pursuit of public policies. Instead we have lists -- endless lists of projects the government would like others to undertake".

It is difficult to overstate the significance of this structural difference between regulatory policies and policies involving the direct expenditure of public funds. The distinction is particularly important for the analysis of Community policy making, since not only the economic, but also the political and administrative costs of enforcing EC regulations is borne by the Member States.

As already noted, the financial resources of the Community go, for the most part, to the Common Agricultural Policy and to a handful of redistributive programmes. The remaining resources are insufficient to support significant initiatives in areas like industrial policy, energy, research, or technological innovation. Given this constraint, the only way for the Commission to increase its role is to expand the scope of its regulatory activities. This is precisely what has happened, and what will probably continue to happen in the future, since any savings in agriculture will have to be devoted to fulfilling the promises made to the economically weaker Member States in exchange for their support of the 1992 programme.

Thus any satisfactory explanation of the remarkable growth of Community regulation must take into account both the desire of the Commission to increase its influence -- a fairly uncontroversial behavioral assumption -- and the possibility of escaping budgetary constraints by resorting to regulatory policy making. But this is only part of the explanation. Another important element is the interest of multi-national, export-oriented industries in avoiding inconsistent and progressively more stringent regulations in various EC and non-EC countries. Community regulation can eliminate or at least reduce this risk.

A similar phenomenon can be observed in the United States, where certain industries, faced with the danger of a significant loss of markets through state and local legislation, have strongly supported federal regulation ("preemptive federalism"). For example, the American automobile industry had good reasons to prefer federal regulation of air pollution because of the threat posed by different and inconsistent air pollution standards and also because it feared "a kind of political domino effect, in which one state legislature after another would set more and more stringent emission standards without regard to the costs and technical difficulties involved... Federal legislation was preferable to state legislation -- particularly if federal standards were set based on technical presentations to an administrative agency rather than through symbolic appeals to cost - externalizing politicians" (Elliott et al. 1985:331).

Thus the car industry, which during the early 1960s had successfully opposed federal emission standards for motor vehicles, abruptly reversed its position in mid-1965: provided that the federal standards would be set by a regulatory agency, and provided that they would preempt any state standards more stringent than California's, the industry would support federal legislation.

Analogous reasons explain the preference for Community solutions of some powerful and well-organized European

industries. Consider, for example, the "Sixth Amendment" of Directive 67/548 on the classification, packaging, and labelling of dangerous substances. This amending Directive 79/831 (OJL 259, 15.10.79) goes much further than the parent Directive of 1967 and the first five amendments by adding a new classification of chemical substances dangerous for the environment and, more importantly, a scheme of prior notification involving tests for potential hazards before a substance is marketed.

The Directive does not prevent Member States including more substances within the scope of national regulations than are required by the Directive itself. In fact, the British Health and Safety Commission proposed to go further than the Directive by bringing intermediate products within the scope of national regulation. This, however, was opposed by the chemical industry, represented by the Chemical Industries Association (CIA) which argued that national regulation should not impose greater burdens on British industry than the Directive placed on its competitors. The CIA view prevailed thus ensuring that in this as in many other cases, Community regulation would in fact set the maximum as well as the minimum standard for national regulation (Haigh 1984).

Similarly, German negotiators pressed for a European-wide scheme that would also provide the framework for an acceptable regulatory programme at home. German firms, concerned about overzealous enforcement by national inspectors and afraid of an environmentally conscious public opinion at home, wanted a full and explicit statement of their obligations to be defined at the EC level. Moreover, with 50 per cent of Germany's chemical trade going to other EC countries, German businessmen and government officials wished to avoid the commercial obstacles that would arise from divergent national regulations (Brickman, Jasanoff, Ilsen 1985).

The European chemical industry had another reason for supporting Community regulation. In 1976 the United States,

without consulting their commercial partners, enacted the Toxic Substances Control Act (TSCA). The new regulation represented a serious threat for European exports to the lucrative American market. A European response to TSCA was clearly needed, and the Community was the logical forum for fashioning such a response. An EC-wide system of testing new chemical substances could serve as a model for negotiating standardized requirements covering the major chemical markets. In fact, the 1979 Directive has enabled the Community to speak with one voice in discussions with the United States and other OECD countries, and has strengthened the position of the European chemical industry in ensuring that the new American regulation does not create obstacles to its exports. There is little doubt that the ability of the Commission to enter into discussions with the USA has been greatly enhanced by the Directive, and it is unlikely that each European country on its own could do so effectively (Brickman, Jasanoff, Ilsen 1985:277).

We can see now why models in which the only political actors are the national governments cannot explain the growth of Community regulation. Thus the model of Rehbinder and Stewart (1985) predicts that process regulation would not occur in a system requiring unanimous consent of the Member States, because states with relatively low standards would find it against their interest to agree to higher standards. Such models overlook too many important factors such as the variety of industrial interests within one country; the advantages of "preemptive federalism" for multinational or export-oriented firms, both for avoiding inconsistent national regulations, and for shifting regulatory decision making to a less political, more technocratic arena; the role of public opinion which makes the adoption of "lowest common denominator" standards increasingly difficult; the importance of speaking with one voice in negotiating international regulatory issues; and last but not least the ability of the Commission to regulate even without adequate legal and budgetary resources.

Given this ability, how should one interpret the minimalist approach to regulation apparently adopted by the Commission in the 1985 White Paper "Completing the Internal Market"? We turn to this question in the next section.

5. The limits of EC-style deregulation

Before discussing the new strategy outlined in the White Paper, it is important to point out that the Commission, even as it strives to expand its regulatory activities, does not attempt to replace or to supervise national regulation. Such a goal would be politically infeasible at present, and would in any case require a large increase in specialist staff, including the creation of Community inspectorates.

Comparing national and Community rule making in a number of policy areas, one can see instead two different regulatory systems, with the second designed to coordinate and complement rather than replace or challenge the first (Vipod 1989). At the same time, one should keep in mind that Community regulation, when agreed by the Council, has primacy over national legislation. Hence, regardless of the intentions of the Commission, national regulators tend to lose power in an increasing number of areas.

Harmonization, rather than unification, of national regulations has been the main objective of the Community in its first 25 years. Harmonization is the adjustment of national rules to the requirements of a common market. Its characteristic instrument is the directive because this instrument only specifies the regulatory objectives to be achieved, leaving the choice of methods to the Member States.

Substantial progress has been made in the creation of harmonized rules on a Community-wide basis. However, by 1985 the Commission had to acknowledge that the amount of work that

remained to be done was such that the goal of completing the internal market by 1993 could not be achieved by relying exclusively on the harmonization approach. In the words of the Commission (1985:18) "experience has shown that the alternative of relying on a strategy based totally on harmonization would be over-regulatory, would take a long time to implement, would be inflexible and could stifle innovation".

After this nod in the direction of the advocates of deregulation, the document lists the key elements of the new strategy: mutual recognition of national regulations and standards; legislative harmonization to be restricted by laying down essential health and safety requirements which will be obligatory on all Member States; gradual replacement of national product specifications by European standards issued by the Comit Europ en de la Normalisation (CEN) or by sectoral European organizations such as CENELEC in the electrical sector and CEPT in the telecommunications sector.

Theoretically, the "new" strategy simply expresses an old principle of federalism (the so-called subsidiarity principle) according to which the higher level of government should intervene only to provide public goods that lower levels cannot supply (Dehousse:1988). Practically, it is an attempt to reduce the burden on the Commission in harmonizing national rules. As such, it could be explained by the French saying "reculer pour mieux sauter": a tactical retreat meant to take advantage of the political appeal of deregulation, and to rally all available forces around the banner of 1992.

It cannot have escaped policy makers in Brussels that while the completion of the internal market calls for massive deregulation at the national level, this must followed by re-regulation at Community level. But as a regulatory solution of the various kinds of market failure that can be expected to arise in an integrated European market, mutual recognition is patently

too weak. For example, it cannot handle negative externalities that transcend national boundaries, nor can it solve the problems which have proved too difficult even for the traditional approach through harmonization, as in the case of pre-market testing of new medical drugs (see below). It is also difficult to see how the new approach can work when some Member States still lack a regulatory framework in important policy areas. Finally, the method of mutual recognition seems to be incompatible with the logic of an integrated European market, since this logic cannot allow the achievement of the single market to be brought into question by unilateral measures of Member States (Joerges, Falke u.a. 1988).

Re-regulation at Community level may actually require to move beyond the traditional approach. Consider the case of drug regulation. For more than two decades, the Commission has attempted to harmonize and unify national regulations for the approval of new medical drugs. The present system includes a set of harmonized criteria and procedures for testing new drugs, and the mutual recognition of toxicological and clinical trials, provided they are conducted according to EC rules.

In order to speed up the process of mutual recognition, a "multi-state drug application procedure" (MSAP) was introduced in 1975. Under the MSAP, a company that has received a marketing authorization from the regulatory agency of a Member State may ask for mutual recognition of that approval by at least five other states. The agencies of the countries nominated by the company must approve or raise objections within 120 days. In the latter case, the Committee for Proprietary Medicinal Products (CPMP) -- a group created by Directive 75/318 and which includes experts from Member States and Commission representatives -- has to be notified. The CPMP must express its opinion within 60 days; within another 30 days it may be overruled by the national agency that has raised objections.

This procedure has not proved to be very effective. Actual decision times are much longer than those prescribed by the 1975 Directive, and national regulators do not appear to be strongly bound either by decisions of other regulatory bodies, or by the opinions of the CPMP (Kaufer 1988:13-15).

Because of these disappointing results, the MSA procedure has been revised by Directive 83/570 which became effective in 1985. Now only two other countries must be nominated in order to be able to apply for a multi-state approval. But even the new procedure has not succeeded in streamlining the approval process, since national regulators raise objections against each other almost routinely. Thus, the path to the mutual recognition of national drug approvals is a thorny one.

As a well-known expert points out (Kaufer 1988:16), the problem is that differences among national schools of medicine, different national attitudes in the evaluation of risks and benefits, and differently perceived needs for new drugs, lead to divergent interpretations of new-drug approvals despite the fact that they have been prepared according to a standardized European format. In the opinion of the same expert, the most likely outcome is that the EC Commission will feel compelled to push for a centralized European Drug Agency (the nucleus of which could be represented by the national experts of the CPMP) in place of the multi-state application procedure.

By 1985, the typical time to complete development of a new drug was about 14 years, and the present value of development costs was of the order of $ 100 million. Hence the savings that could be achieved by a well functioning European Drug Agency are sufficiently large to make the idea of centralized drug regulation very attractive.

Analogous proposals have been made by other analysts, for example in the area of product safety (Joerges, Falke u.a. 1988). Moreover, the Commission itself, in the latest (fourth) action programme for the environment has put forward the idea of a

European environmental inspectorate, while a proposal for a European Environmental Agency is currently receiving a good deal of attention in Brussels. I conclude that, despite the minimalist language of the 1985 White Paper, all the signs point not in the direction of deregulation but of a significant increase in regulatory activities at the EC level.

6. Reforming regulatory policy making in the European Community

If it is true that the scope and complexity of Community regulation are growing pari passu with the completion of the internal market, one question remains to be discussed: are present procedures and institutions adequate to meet the challenge, or are substantial reforms needed?

Present methods of regulatory decision making suffer from a number of defects. Among the shortcomings identified by analysts in various policy areas are the absence of central coordination, leading to serious inconsistencies across and within regulatory programmes, lack of rational procedures for selecting priorities, and insufficient attention paid to the cost-effectiveness of individual rules. In short, the present regulatory process is inefficient, in the sense that the same quantity of resources used to meet regulatory objectives could be reallocated to produce a greater level of benefits.

The process also suffers from a lack of political oversight, not only by the European Parliament but also by the President of the Commission and by the Council. The lack of political guidance and control is bound to become increasingly serious, since the growing complexity of regulation will require greater reliance on standing committees of experts and perhaps the creation of specialized agencies like a European Drug Agency or a European Environmental Agency.

Political oversight should be exercised at three different levels: at the highest level, in order to evaluate the total impact of regulation; at an intermediate level, in order to set priorities among different regulatory programmes, both within and across Directorates (or future regulatory agencies); and at the lowest level, to evaluate and compare individual rules in terms of the benefits and costs they are expected to produce. As indicated above, regulatory oversight is largely missing even at the lowest level.

Students of the American regulatory process have argued that the root cause of both economic inefficiency and inadequate political oversight is the absence of a regulatory budget process (Litan and Nordhaus 1983; De Muth 1984; Mendeloff 1988). Because the size of regulatory programmes is not significantly constrained by congressional appropriations and by the level of tax revenues, as in the case of direct-expenditure programmes, the regulatory process misses four steps central to bringing any expenditure under control.

First, neither the Executive nor Congress systematically determine the overall level of regulatory activity in a given period. Second, no office in the executive branch or committee in Congress is responsible for systematically establishing regulatory priorities across government. Third, the Executive has not instituted any systematic process of submitting regulatory proposals to Congress. Finally, there is no central agency to audit regulatory programmes. In short, no mechanism exists for regulation that requires policy makers throughout the government to solve the two-level budget problem -- how much to spend during a given period and then how to allocate this total amount among alternative uses -- which is addressed by any government in its direct-expenditure activities (Litan and Nordhaus 1983:86-87).

Many defects of the American system have their counterpart in Community regulation. Actually, as already noted, budgetary discipline is even weaker here since the burden of implementing

Community regulation is carried by the governments of the Member States. Also, the absence of a central political authority implies that regulatory issues are dealt with sector by sector, with little attempt to achieve overall policy coherence.

Even within the same sector, it would be difficult to maintain that regulatory priorities are set in a way that explicitly takes into consideration either the urgency of the problem, or the benefits or costs of different proposals. For example, the imbalance between water and air pollution control in Community environmental regulation can hardly be explained by differences in the seriousness of the relevant problems. The health and environmental effects of inadequate regulation of air pollution, as well as the impact of divergent national regulations on competition, are no less serious than in the case of water pollution.

Again, some product directives choose total harmonization, in which case national regulations are completely replaced by Community regulation, while others rely on optional harmonization, without any obvious connection with the perceived seriousness of the relevant environmental or health risks. The piecemeal procedure of the Commission in proposing new regulation has resulted in directives in areas where harmonization is a low priority, while neglecting other areas which need a considerable amount of harmonization (Rehbinder and Stewart 1985:322-323).

Now, it is true that many defects of regulatory policy making in the Community are due to political and institutional factors -- such as the complexity of joint decision making, disagreements of Member States concerning priorities, or the need of the Commission to respond to national initiatives -- which cannot be modified in the short or medium term.

However, some improvements should be possible even within present constraints. For example, coordination could be improved by setting up a "regulatory clearing house" located at the highest level of the Community bureaucracy. Directorates-General

(DGs) would be asked to submit annually draft regulatory programmes to the clearing house for review. When disagreements or serious inconsistencies arise, the President of the Commission or a "working committee on regulation" would be asked to intervene. By extending centralized control over the regulatory agenda of DGs responsible for closely related areas such as environment, occupational health and safety, consumer protection and food and drug regulation, this review process would help the Commission shape a consistent set of measures to submit to the Council and the Parliament.

The usefulness of the procedure as a tool of managerial control could be increased by coordinating the regulatory review with the normal budgetary review, thus linking the level of budgetary appropriations to the cost-effectiveness of different regulatory programmes. The knowledge that DGs would be competing against each other would lead them to propose their "best" regulations. At the same time, simultaneous consideration of all new regulations would permit to assess their joint impact on particular industries and the European economy as a whole.

In addition to new coordinating mechanisms like the regulatory clearing house, it would be useful to examine the potential for coordination of instruments that have not been designed for that purpose. An interesting example is the environmental impact assessment (EIA) recently introduced into Community legislation. American experience under the National Environmental Protection Act (NEPA) suggests that EIAs have considerable potential as a coordinating mechanism. The NEPA requires all federal agencies to analyze the environmental effects of proposed actions, and of reasonable alternatives to such actions. From the view point of coordination, perhaps the most significant part of the requirements is the review and comment process. Because of its obligations under the NEPA, the Environmental Protection Agency is the only federal agency to comment on practically all impact statements. Hence, the review

and comment period serves as an opportunity for interagency coordination since it assures active participation by all agencies involved.

Introducing a similar procedure into the Community policy making process would not only improve coordination, but also serve to implement the requirement of the Single European Act that environmental considerations shall become part of all the other policies of the Community. In order to institutionalize this internal review process, the Directorate General for the Environment should be given the possibility of commenting on programme proposals made by other DGs. The coordinating potential of the review procedure would be greatly enhanced if EIAs were not limited to individual projects, as in the present EC directive, but could be extended to cover groups of related programmes ("joint environmental impact assessments").

Another important direction of regulatory reform -- the creation of specialized agencies and inspectorates -- has already been mentioned. A detailed discussion of such matters would exceed the scope of this paper. However, it is important to point out that these recent proposals represent not so much radical innovations as a development of institutions already present in nuce in Community policy making. Thus, a European Drug Agency would presumably develop out of the Committee for Proprietary Medicinal Products. Other permanent committees of experts could undergo a similar evolution. One can even detect the nucleus of a future environmental inspectorate in the group of national representatives who meet regularly with the Commission to review the working of the 1979 Directive on testing, notification and classification of new chemicals (Haigh 1984).

Any proposal for reforming Community policy making is bound to raise serious doubts about its implementability. It is quite possible that the number of politically feasible solutions is much smaller than the range of alternatives suggested by policy analysis. But however tight the constraints, they should not be

allowed to obscure the fact that in the perspective of a fully integrated European market and the consequent growth in volume and complexity of Community regulation, the question of regulatory reform can no longer be evaded.

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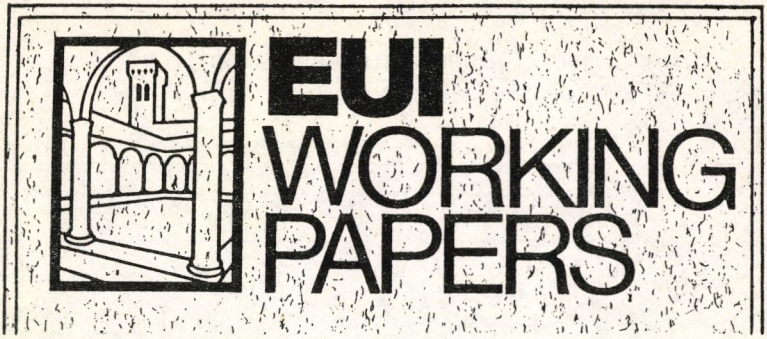

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